IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-609

TERMINAL FREIGHT HANDLING CO. and TERMINAL FREIGHT COOPERATIVE ASSOCIATION, *Petitioners,*

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board, *Respondent.*

MOTION TO INTERVENE ON BEHALF OF SEARS, ROEBUCK AND CO.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Sears, Roebuck and Co. ("Sears") hereby respectfully moves to intervene in this case. Sears and Petitioner Terminal have been identically aggrieved by various actions of Respondent Solien. In the present case, that aggrievement consists of Solien's refusal to promptly seek injunctive relief, in derogation of the mandatory requirements of Section 10(l) of the National Labor Relations Act, to protect Sears and Terminal from the devastating effects of unlawful secon-

dary boycott activities. Since the instant petition was filed, Sears and Terminal have also been subjected to two other deprivations arising out of the same factual situation, by decisions of the Eighth Circuit. Petitions for certiorari in these cases will be submitted to this Court no later than January 13, 1972. Intervention by Sears in the present case is, therefore, appropriate.

More specifically, the present motion is founded on the following grounds.

1. The matters at issue in the instant case directly involve Sears as well as Terminal. Sears, as well as Terminal, was victimized by union secondary boycott activity flowing out of the same underlying dispute. As a result, Sears also filed unfair labor practice charges with Solien. And, as in the case of Terminal, although Solien found that there was reasonable cause to believe such charges were true, notwithstanding the mandatory language of Section 10(1), no injunctive relief was sought. Instead, Sears was subjected, along with Terminal, to a lengthy continuation of the union's unlawful conduct. It was not until Sears joined with Terminal in instituting the present action that Solien petitioned for temporary injunctive relief which, in turn, caused the union to cease its impermissible conduct. Believing that its objective had been achieved, Sears then voluntarily withdrew as a plaintiff.

The decision below, by sanctioning future similar conduct by Board Regional Directors, rekindles Sears concern. Any immediate gain that may have accrued to Sears by this action has now been far outweighed by the substantial erosion of the secondary boycott protections of the Act affected by the Eighth Circuit. The

present case is not an isolated one but, instead, is part of a pattern of conduct by the Board which raises recurrent issues of serious national concern.[1] This severe remedial backsliding will necessarily involve Sears.[2] As a result, and because Sears has a common question of law and fact with the main action, this motion to intervene is filed so that Sears may resume its participation in this case.

2. The instant case, known as "Solien II", presents only one aspect of a multi-faceted controversy. Sears and Terminal were also denied various participatory rights in the district court 10(1) proceeding after Solien finally commenced that suit. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), *cert. den.*, No. 1588, O.T. 1971 ("Solien I"). In addition, Sears and Terminal were also aggrieved by Solien's refusal to permit their meaningful participation in the settlement of their underlying Board charges. *Sears, Roebuck and Co.* v. *Solien*, —F.2d—, 78 LRRM 2700 (8th Cir. No. 3, 1971) ("Solien

[1] The widespread nature of the conduct here at issue is also evidenced by the close scrutiny which the general counsel of the Board is now giving to the *substantive* components of settlements in the secondary boycott area. This examination is the result of the decision in *Sears, Roebuck and Co.* v. *Solien*, — F. 2d —, 78 LRRM 2700 (8th Cir. Nov. 3, 1971) ("Solien III"), as well as the extensive study undertaken by Sears in this case to examine in depth Board practice. See brief of *amicus* Chamber of Commerce of the United States of America, n. 8. The present case provides the Court with the opportunity to delineate the Board's correlative *procedural* obligations in the context of a continuing controversy in this important area of the law.

[2] Sears, as the largest retailer in the United States, is frequently the target of proscribed secondary boycott activity. See, e.g., in addition to the present case, *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U. S. 655 (1970).

III"). Finally, in an extension of *Solien I,* both employers were also recently denied even the limited rights afforded charging parties in a Section 10(1) proceeding that it was presumed the decision below recognized, i.e., the right to independently oppose a stipulation negotiated in lieu of injunctive relief. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610,* — F.2d — (8th Cir. Dec. 17, 1971) ("Solien IV").[3]

Petitions for writs of certiorari are presently being prepared in both *Solien III and IV* and are expected to be filed no later than January 13, 1972. In addition, because the various *Solien* cases *in toto* provide this Court with a desirable vehicle to consider all aspects of the participatory rights of charging parties, Sears and Terminal contemplate filing a joint motion to defer consideration of the present case so that it may be considered in conjunction with *Solien III and IV.* The present motion to intervene, along with the similar motion Sears will file in *Solien IV,* supplements this

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[3] Sears also contemplates moving to intervene in *Solien IV* as soon as the petition for certiorari is filed in that case. This motion will be predicated on various considerations: (i) that the errors complained of in *Solien IV* were committed in district court proceedings which involved Sears and which, on review of a different part of the court's decision, formed the basis for Sears petition for certiorari in *Solien I;* (ii) that the subject matter of *Slien IV*—the rights of charging parties in a Section 10(1) proceeding—is one which Sears and other parties have heretofore presented to this Court but which, because of mootness, has not yet been adjudicated (see, e.g., *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers, supra,* and *The Los Angeles Herald Examiner* v. *Kennedy,* 400 U.S. 3 (1970)); and (iii) that because *Solien IV* arises as part of a viable controversy, any decision of this Court will necessarily delineate Sears rights as well as those of Terminal.

joint motion by insuring that the same parties will be before the Court in each of the *Solien* cases.

3. Granting the instant motion will in no way delay these proceedings, burden the Court or impair any adjudication of the rights of the parties. Sears does not intend to file any brief of its own in support of the present petition but, rather, would merely adopt the position that has already been advanced by Terminal and *amicus* Chamber of Commerce. The only document that Sears would contemplate filing at the present time is the aforesaid joint motion to defer consideration of this case. And this motion, as previously noted, would facilitate the disposition of this matter by providing the Court with an opportunity to consider all variants of the question presented and ensuring that its time will not be misspent.

4. Issuance of decision by the court below does not preclude intervention at this time. The policies underlying intervention, as set forth in Rule 24 of the Federal Rules of Civil Procedure, may also be applicable in appellate courts. *United Automobile, Aerospace and Agricultural Implement Workers of America, Local 238* v. *Scofield,* 382 U.S. 205, n. 10 (1965). In an appropriate case, such as the instant one, appellate intervention should be allowed. See, e.g., *McKenna* v. *Pan American Petroleum Corporation,* 303 F. 2d 778, 779 (5th Cir. 1962); *Wolpe* v. *Poretsky,* 144 F. 2d 505, 507-8 (1st Cir. 1944); and Moore, Federal Practice (2nd Ed.), Sec. 24.13. This Court recognized this principle in *N.L.R.B.* v. *Acme Industrial Co.,* 385 U.S. 432 (1967), where, on motion, intervention was granted to a party who had not participated in the proceedings before the court of appeals Order of Court dated May 2, 1966 in No. 52, O.T. 1966.

5. Counsel for Terminal has informed the undersigned he has no objection to the granting of this motion.

WHEREFORE, Sears prays that it be permitted to intervene in this case.

Respectfully submitted,

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Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE PHILLIPS PLUMBING AND HEATING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.*

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